Morse Operations, Inc., d/b/a Ed Morse Auto Park *and* National Organization of Industrial Trade Unions. Cases 12–CA–18836, 12–CA–18856, 12–CA–19329, 12–CA–19329–2, and 12–CA–19471

November 30, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On September 7, 1999, Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent and the General Counsel filed exceptions and cross-exceptions, respectively, along with supporting and answering briefs.[1]

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

1. In adopting the judge's finding that the Respondent violated Section 8(a)(1) of the Act by Assistant Service Manager Dan Crawford's statement to discriminatee Peter Hanscom on June 6, 1997, that he was going to "stop" Hanscom and "have the Union thrown out," we find it unnecessary to pass on the judge's finding that Crawford was a supervisor within the meaning of Section 2(11) of the Act. The Respondent stipulated at the outset of the hearing that Crawford was an agent of the Respondent within the meaning of Section 2(13). Thus, Crawford's threat is attributable to the Respondent. See, e.g., *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426 (1998).

2. The judge found that auto repair technicians Peter Hanscom, Joseph Niciforo, Eton Leung, and Henry Brodhurst were discharged in violation of Section 8(a)(3) and (1) of the Act. As the judge explained, under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the General Counsel has the burden of showing that protected conduct was a motivating factor in these discharges. We find that the General Counsel has met this burden. In this context, in addition to the evidence cited by the judge, the record shows that all four discriminatees were highly qualified technicians with excellent employment records; that none of them had been disciplined by the Respondent before they became open and active union supporters; and that their discharges effectively removed almost half of the Respondent's technicians who were union supporters.[4]

The evidence also establishes that Hanscom, the first of the discriminatees to be terminated, was summoned to a meeting with the Respondent's supervisors and placed on suspension on June 6, 1997, just 2 weeks after the Union won a Board-conducted election to represent the Respondent's technicians.[5] Hanscom testified, without contradiction, that at this meeting, immediately after Service Manager Bill Yanick told him he was being suspended, Service Director Peter Lombardo said: "You know, everybody here is going to start getting written up. I don't know why everybody wants to fight the Union. The Union is going to be here and it's going to stay."[6] Although Lombardo's statement can be interpreted as indicating acceptance of the fact that the Union is the representative, his first sentence suggests that the Respondent will deal more harshly with employees as a result of that union representation. And, since this statement was made contemporaneously with the suspension of Hanscom, it supports the conclusion that the suspension was discriminatorily motivated.

In view of this evidence, along with the evidence of animus cited by the judge, we agree that the General Counsel made the required showing that the discriminatees' protected activity was a motivating factor in each of their discharges.

[1] The Respondent filed a motion to withdraw its exceptions to the judge's findings pertaining to the Union's status as the employees' bargaining representative and to the wage increases the Respondent gave to some employees during December 1997. We grant the Respondent's motion.

[2] Although the Respondent contends that the judge ignored material evidence, these contentions are essentially exceptions to the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, the Respondent contends that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[3] We find merit in the General Counsel's exception that the judge's recommended Order and notice failed to remedy the unlawful disciplinary warning issued to Peter Hanscom. We will also modify the recommended Order and notice to conform to the violations found and to provide for narrow injunctive language.

We will modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

[4] In addition, during the first part of May 1997, after the Union had filed its petition but before the election, the Respondent thought highly enough of Hanscom to make him a "group leader," a position he chose to relinquish after a week.

[5] The judge mistakenly indicated that Hanscom's suspension occurred on June 8.

[6] Although Lombardo subsequently testified, he did not deny having made this statement.

We also agree with the judge that the Respondent's contention that all four discriminatees would have been terminated for lawful reasons absent their protected activity is not supported by the record. Niciforo and Leung were discharged under the Respondent's asserted policy of "zero tolerance" for negligent repair work. In addition to the credited evidence cited by the judge, the record shows that another technician, Dominic Marchetto, suffered no disciplinary sanction under that policy even though he failed to replace a car's defective gas line, which resulted in a fire that engulfed the car's entire front section. Moreover, while the Respondent claimed that another employee, Robert Long, was discharged under the "zero tolerance" policy, the record establishes that at the time of Long's discharge the Respondent had already placed him on a 90-day probation for repeated dishonest actions. The evidence pertaining to Marchetto and Long provides further support for the judge's finding that Niciforo and Leung, given their exemplary work records, would not have been terminated solely for alleged negligence had they not been associated with the Union. For these reasons and those stated by the judge, we find that the Respondent violated Section 8(a)(3) by discharging the four discriminatees.[7]

3. In adopting the judge's finding that the Respondent violated Section 8(a)(5) and (1) by reducing employees' pay effective February 1, 1998, without bargaining with the Union, we rely on, in addition to the credited evidence cited by the judge, the Respondent's stipulation that Ed and Ted Morse "wholly owned" Global Warranty Corp., and the record evidence establishing that the Morses had a major interest in Fidelity Warranty Services. These facts undercut the Respondent's contention that the pay reduction was imposed by two "outside" warranty companies. Moreover, the periodic changes in the "Chilton's manual" of approved work time estimates, also relied on by the Respondent, are correlated to highly specific repair tasks and do not provide a basis for generalized pay reductions of the type imposed by the Respondent on this occasion.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Morse Operations, Inc., d/b/a Ed Morse Auto Park, Lake Park, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling union proponents that it is going to "stop" them, and have the Union thrown out.

(b) Telling the collective-bargaining representative that there is no Union at the facility, and that its shop steward is not the steward.

(c) Telling employees that they will be discharged for engaging in union activity.

(d) Soliciting employees to deal directly with the Respondent regarding raises and terms and conditions of employment.

(e) Telling employees that it would be futile for them to support the Union as their bargaining representative.

(f) Discharging or issuing disciplinary warnings to employees because of their union or other protected concerted activity.

(g) Giving pay raises or other benefits to employees without first giving the collective-bargaining representative an opportunity to bargain over these matters.

(h) Reducing the pay rate of employees without first giving the collective-bargaining representative an opportunity to bargain over this matter.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Peter Hanscom, Joseph Niciforo, Henry Brodhurst, and Eton Leung full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Peter Hanscom, Joseph Niciforo, Henry Brodhurst, and Eton Leung whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them, plus interest, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, so-

[7] We find merit in the General Counsel's exception to the judge's failure to find that Brodhurst's discharge, which was based not only on his union activities but on his protected concerted activity in protesting a pay reduction, independently violated Sec. 8(a)(1) as well as Sec. 8(a)(3). However, our finding in this regard does not affect the judge's recommended Order.

Although Chairman Hurtgen concurs in these findings, he does not agree with the judge's sweeping statement that "an employer's failure to conduct a fair investigation . . . constitutes evidence of discriminatory motivation."

cial security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Make all employees whole for any loss of earnings and other benefits they may have suffered as a result of the unlawful reduction of pay rates, plus interest.

(f) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time technicians at the Respondent's facility in Lake Park, Florida.

(g) Within 14 days after service by the Region, post at its Lake Park, Florida facility, copies of the attached notice marked Appendix.[8] Copies of the notice, on forms provided by the Region Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Responsible steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the tendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expenses, a copy of the notice of all current employees and former employees employed by the Respondent at any time since May 21, 1997.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell union proponents that we are going to "stop" them and have the National Organization of Industrial Trade Unions thrown out.

WE WILL NOT tell the Union that there is no union at the facility, and that the Union's shop steward is not the steward.

WE WILL NOT tell employees that they will be discharged for engaging in union activity.

WE WILL NOT solicit employees to deal directly with us regarding pay raises and other terms and conditions of employment.

WE WILL NOT tell employees that it would be futile for them to support the Union.

WE WILL NOT discharge or issue disciplinary warnings to employees because of their union or other protected concerted activity.

WE WILL NOT give pay raises or other benefits to employees without first giving the Union an opportunity to bargain over these matters.

WE WILL NOT reduce the pay rate of employees without first giving the Union an opportunity to bargain over these matters.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL offer Peter Hanscom, Joseph Niciforo, Henry Brodhurst, and Eton Leung full reinstatement to their former or equivalent positions, and make them whole for any loss of earnings they may have suffered, plus interest, as a result of the discrimination against them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Peter Hanscom, Joseph Niciforo, Henry Brodhurst, and Eton Leung, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL make all employees whole for any loss of earnings and other benefits they may have suffered as a

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

result of our unlawful reduction of pay rates, plus interest.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time technicians at our facility in Lake Park, Florida.

MORSE OPERATIONS, INC., D/B/A ED MORSE AUTO PARK

George S. Aude, Esq., for the General Counsel.
Benjamin B. Culp Jr., Esq. (Fisher & Phillips LLP), for the Respondent.
Joseph Merino, Business Organizer, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The charges were filed at various times[1] by National Organization of Industrial Trade Unions (Local 119), affiliated with National Organization of Industrial Trade Unions (NOITU). Consolidated complaints issued on January 27 and September 29, 1998, and an amendment to the latter on December 11, 1998. The amendment alleges that Local 119 had merged with its parent organization, NOITU, on January 1, 1998.

The last consolidated complaint alleges that Morse Operations, Inc., d/b/a Ed Morse Auto Park (Respondent or the Company) at various times in 1997 threatened employees with reprisals for engaging in union activities, told employees that the Union was not their collective-bargaining representative, that Respondent would not deal with the Union or its shop steward, threatened employees with discharge if they supported the Union, solicited employees to deal directly with Respondent regarding terms and conditions of employment, promised employees raises if they would not support the Union, and told employees that it would be futile for them to support the Union.

The complaint further alleges that, on various dates in 1997, Respondent administered verbal and written discipline to employee Peter Hanscom and discharged him and employee Joseph Niciforo, and, in 1998, employee Eton Leung, because they joined or assisted the Union and engaged in concerted activities, in order to discourage employees from engaging in such activities.

The complaint also alleges that on November 14, 1997, the Board certified Local 119 as the employees' exclusive collective-bargaining representative in an appropriate unit,[2] and that NOITU has been their representative since January 1, 1998, based on the merger of Local 119 and NOITU on that date. Respondent denies the validity of the certification.[3]

The complaint additionally alleges that, in about December 1997, Respondent granted wage increases to certain unit employees and later reduced wage rates of other employees, without giving prior notice to the Union and without affording it an opportunity to bargain over these actions, thus violating Section 8(a)(3) and (5). The complaint further alleges that Respondent discharged employee Henry Brodhurst on February 20, 1998, for participating with other employees in protesting the reduction in pay, and engaging in union activities.

A hearing on these matters was conducted before me in Miami, Florida, on January 11–15, and February 22–24, 1999. Thereafter, the General Counsel and Respondent filed briefs. Based on the entire record, and my observation of the demeanor of the witness, I make the following

FINDINGS OF FACT

I. JURISDICTION

The pleadings establish that Respondent is a Florida corporation, with an office and place of business in Lake Park, Florida, where it is engaged in the sale and service of new and used automobiles. During the 12 months preceding issuance of the last complaint, Respondent derived gross revenues in excess of $500,000 and purchased and received at its facility goods and materials valued in excess of $10,000 directly from points located outside the State of Florida. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The last complaint alleges and Respondent's answer admits that Local 119 is a labor organization within the meaning of Section 2(5) of the Act.[4] The amendment to the last complaint alleges that NOITU is a labor organization. Respondent's answer asserts that it is without knowledge, and therefore denies the allegation.[5] The record evidence shows that NOITU engages in the statutory functions of a labor organization, and I find that it is in fact a labor organization within the meaning of Section 2(5).

II. PRIOR LITIGATION

Pursuant to a stipulated election agreement, an election was held in the unit described above on May 23, 1997. The initial tally of ballots showed 8 votes cast for Local 119, 6 against it, and 2 challenged ballots. The employer filed objections, and a hearing was held before a hearing officer, who recommended that the objections be overruled. The Board adopted the hearing officer's recommendation, and remanded the case to the Regional Director with instructions to open and count the two challenged ballots. A revised tally of ballots showed 9 votes

[1] The original charge in Case 12–CA–18836 was filed on June 10, 1997, the first amended charge on June 25, 1997, the second amended charge on September 18, 1997, and the third amended charge on September 24, 1997; the original charge in Case 12–CA–18856 was filed on June 23, 1997; the original charge in Case 12–CA–19329 was filed on February 26, 1998, and an amended charge on September 18, 1998; the original charge in Case 12–CA–19329–2 was filed on February 26, 1998, and a first amended charge on August 31, 1998; the original charge in Case 12–CA–19471 was filed May 4, 1998.

[2] All full-time and regular part-time technicians employed by Respondent at its facility located at 3703 N. Lake Boulevard, Lake Park, Florida, excluding all other employees, office clerical employees, managerial employees, guards, and supervisors as defined in the Act.

[3] GC Exh. 1(hh), par 5(jj), par. 5.

[4] GC Exh. 1(hh), par. 3; GC Exh. 1(jj), par. 3.

[5] GC Exh. 1(oo), par. 3(b); GC Exh. 1(qq), par. 3.

for Local 119 and 7 against it. The parties stipulated that on November 14, 1997, the Board certified Local 119 as the exclusive collective-bargaining agent of the employees in the unit described above.[6]

Union President Joseph Merino wrote Respondent a letter stating that Local 119 had been certified, and requested bargaining.[7] On November 19, 1997, company counsel by letter rejected the Union's bargaining demand.[8]

On December 8 and 24, 1997, Local 119 filed charges in Case 12–CA–19194 alleging that Respondent had violated Section 8(a)(5) and (1) by refusing to bargain, and complaint issued on this charge. Following an investigation, a Motion for Summary Judgment was filed, which was granted by the Board on March 23, 1998, finding that Respondent had violated Section 8(a)(5) and (1) by refusing to bargain with Local 119. *Ed Morse Auto Park*, 325 NLRB No. 77 (1998) (not reported in Board volumes). This decision is now on appeal before the 11th Circuit Court of Appeals.

III. THE ALLEGED UNLAWFUL DISCHARGES

The complaint alleges four unlawful discharges, two early in 1997 and two in 1998, including one connected with an alleged violation of Section 8(a)(5). This section of the decision will deal with three of the discharges and one alleged unlawful threat.

A. The Discharge of Peter Hanscom

1. Hanscom's employment history and union activity

Peter Hanscom worked as a professional auto repairman since 1975. He started working at the Lake Park facility in August 1994, under a predecessor of Respondent, and specialized in Chrysler automobiles. Hanscom was a "drivability technician," and was responsible for repair of starting and stalling problems. He repaired oxygen sensors and throttle-by services, replaced injectors, and installed vehicle computers. Hanscom was a certified mechanic in engine and electrical repair, air-conditioning, and drivability or engine performance repair. He was selected as technician of the month in June 1996.

Hanscom signed a union card on April 12, 1997, collected 18 union authorization cards, and attended at least five union meetings, four of which were at his house. He wore a union hat starting in late May 1997, and was seen doing so by various supervisors.

2. The incidents with Peter Felder on May 21

A series of incidents took place between Hanscom and Peter Felder on about May 21, 1997, 2 days before the election. Felder was a service writer, whose job included receipt of customer complaints about vehicles, generation of a work order, and transmission of work orders to the dispatcher. Hanscom testified that Felder on May 21 told him that a customer had complained about a car on which Hanscom had worked a day or two before. Felder told Hanscom that the car was across a divided highway from the dealership, had stalled, but the engine was turning over. Hanscom told Felder to have a wrecker bring the car in, and he would examine it. Felder replied that Hanscom should go out to the vehicle, examine it, and push it into the dealership. Hanscom responded that the Company did not do "roadside assistance," Hanscom testified that Felder became angry, and told Hanscom that he was going to "come over the wall and punch you in the pussy mouth." Hanscom replied that Felder was not that stupid and did not have enough money. Neither Felder nor the owner of the vehicle testified about these incidents. A wrecker brought the car in and it was found to have a blown fuse.

About an hour later, Service Manager Bill Yanick approached Hanscom, who told him that Felder had verbally threatened Hanscom. The latter was called to a meeting with General Manager Thomas Naso, Service Director Peter Lombardo, and Service Manager Bill Yanick. Naso asked Hanscom what all the yelling and screaming was about. According to Hanscom, he denied that there was any yelling or screaming, and told Naso that Felder had threatened him with bodily harm. Lombardo testified that Hanscom replied to Naso that he was not in an argument with Felder, and should not have been instructed to go out and get the vehicle. Yanick corroborated Hanscom. Naso warned Hanscom that he and Felder had not acted professionally and that if it happened again, Hanscom would be terminated. Felder also received a warning. Naso told Hanscom that he wanted to discuss the Union, but Hanscom declined.

I credit Hanscom's version of the meeting with Naso, and his uncontradicted testimony of his conversation with Felder.

3. The incident with Frank Waterbury on May 28, 1997

Frank Waterbury was a technician at the beginning of 1997. In late April or early May he was promoted to the position of "group leader." He actually worked as a dispatcher, at $17 hourly. On receipt of a work order from a service writer, a dispatcher assigns it to the technician best qualified to do the work, depending on his training, skills, whether the customer is waiting for the vehicle, and whether it is a "re–check," i.e., a vehicle brought in after a repair had already been done.

Union Representative Tucci worked directly across from Waterbury's work area. Tucci testified that, after Waterbury became a dispatcher, he spent 85 percent of his time performing dispatching work, and 15 percent doing automotive repair work. Hanscom testified that he did not see Waterbury repair any cars after his promotion. The Company placed a desk in his work area, and slots for repair orders. In September 1997, Waterbury was made a shop foreman at $20 hourly.[9]

On May 28, Hanscom had five or six repair orders, including one for a Mitsubishi. He had limited training on Mitsubishi automobiles. Although there was some similarity between Mitsubishi and Chrysler parts, the "electronics" were different. Hanscom asked Waterbury what he should do about it. Waterbury replied that the car did not run, and Hanscom should

[6] R. Exhs. 9 and 10. The title of the certified labor organization was "National Organization of Industrial Trade Unions, Local 119."

[7] GC Exh. 13. The letter is dated November 4, 1997, i.e., prior to the certification on November 14. I conclude that this was an inadvertent error, and that the correct date was November 14.

[8] GC Exh. 14.

[9] GC Exh. 56 was signed by Service Director George Riker.

repair it. Hanscom replied that he did not know anything about Mitsubishi automobiles. He had worked only on Chryslers, which had a "different language" from Mitsubishi's. Waterbury replied that he would get somebody else.

Hanscom put the rest of his tickets on his toolbox. He went to the parts department, and, when he returned, all his repair tickets were gone. Hanscom went to the dispatcher department and noted that his slot, which he had just emptied, was full. In it were orders, which he characterized as "garbage—a trim panel, a window that wouldn't go up, a water leak, an oil change, etc."

4. The incidents with Dan Crawford

a. Crawford's authority and the compensation of technicians

Dan Crawford was a "service writer, assistant manager," according to Union Steward Pat Tucci. Crawford's business card described him as "assistant service manager."[10] Union Representative Pat Tucci testified that when he was hired, then Service Manager Martino told him that Crawford was Martino's assistant, and that Tucci could go to him if he had any problems in Martino's absence. Tucci testified that Crawford could place a technician's number on a repair ticket, and the dispatcher would direct the job to that technician.

Crawford could reduce the labor charges on a repair ticket, and thus reduce the payment to the technician. Technicians had an hourly wage scale. However, the numbers of hours, which they worked, were not necessarily the hours for which they were compensated. Each particular repair had a prescribed number of hours to complete it, and technicians were paid according to this formula rather than the actual time. There were three such formulas, which were listed in a compendium called a "Chilton's manual." The lowest formula was a manufacturer's "warranty time." If the vehicle was not "under factory warranty," it may have been covered by an "extended warranty" agreement with a private company. These formulas customarily allowed a greater amount of time, and thus a greater revenue to the technician, than the manufacturers' warranties. Finally, a job could be compensated by an amount paid by the customer.

Union Representative Tucci testified that Crawford had the authority to "discount" the labor cost of the repair job when a customer protested the cost, i.e., reduce the prescribed hours for the job. This resulted in a reduction of the compensation to the technician. The only other individuals who had this authority were Service Manager Yanick and Service Director Lombardo, both admitted supervisors.

Another factor in employee compensation was the fact that certain jobs required more time than that allowed in the Chilton's manual. Union Representative Tucci and Hanscom testified that Crawford could "starve out" a technician by assigning him a disproportionate number of such jobs.

b. Hanscom's dispute with Crawford on June 6, 1997

On June 6, Hanscom was working on a job assigned to him by Crawford. The job had been "discounted" by Crawford one half-hour.

[10] GC Exh. 45.

Technicians use various parts in the repair job, and some of these have coupons supplied by the parts manufacturer, which could be used to purchase gifts. These are called "spiff" coupons. Technicians were supposed to retain half and give the other half to the supervisor. A part utilized by Hanscom on June 6 had a "spiff" with it. Crawford approached him and asked for half of the coupon. Hanscom asked him to restore the one half-hour of time that Crawford had taken away from him. Crawford replied, "No deal," and added that he was going to "stop" Hanscom and "have the Union thrown out."

Crawford did not testify, and I credit the uncontradicted testimony of Tucci and Hanscom.

5. Hanscom's suspension and discharge

Hanscom was called to a meeting with Service Director Yanick on June 8, 1997. Yanick asked what Hanscom's problem was, and Hanscom said he wanted to know why his hours were being cut. Waterbury, who was present, said that the reason was the fact that Hanscom did not work on the Mitsubishi. Hanscom disputed this. The incidents with Felder and Crawford were also discussed. Yanick told Hanscom that he was on suspension, and Hanscom went home. He filed charges with the Board, and a few days later Lombardo called and informed him that he was terminated.

6. Legal conclusions

a. The supervisory status of Dan Crawford

The Act defines a supervisor as any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.[11] Possession of any one of these powers is sufficient to confer supervisory status. *NLRB v. Edward G. Budd Mfg. Co*., 169 F.2d 571, 576 (6th Cir. 1948), cert. denied 335 U.S. 908 (1949).

The Board has found that a journeyman tooler, who assigned tasks to individuals in accordance with his appraisal of their ability to perform the task, was a supervisor within the meaning of Section 2(11). *Lab Glass Corp*., 296 NLRB 348, 359 (1989).[12]

Summarizing Crawford's functions, he was a "service assistant manager," whose business card indicated the latter title. Pat Tucci was told by the service manager that Crawford was the manager's assistant, and that Tucci could go to him in the service manager's absence. This constitutes evidence of supervisory status. *Armored Transfer Service*, 287 NLRB 1244 (1988); *Aztec Concrete*, 277 NLRB 1244 (1985).

Crawford had and exercised the authority to assign work to technicians by placing the technician's number on the job ticket. Waterbury testified that this selection was based on various factors—the technician's particular skills, whether the customer was waiting for the vehicle, and whether it was a "re–

[11] Sec. 2 (11).

[12] Accord: *Massachusetts Coastal Seafoods*, 293 NLRB 496, 505 (1989).

check." This decision was not routine, and required independent judgment regarding the special expertise of the technicians, as well as the needs of waiting customers. *Lab Glass Corp*., supra.

Crawford could "discount" the allotted time for a job, and assign to it technicians in an disproportionate number of low-paying jobs, and thus reduce the technician's compensation. The only other individuals who could do this were admitted Supervisors Yanick and Lombardo.

The Board has recently issued a decision on the issue of the supervisory status of "dispatchers" of distribution systems for a power and light company. *Mississippi Power Light Co.*, 328 NLRB 965 (1999). The decision is extensive, and details the use of advanced electronic equipment by the dispatchers. For a variety of reasons not present in the case at hand, the majority decided that the dispatchers were not supervisors. Because of the factual differences, I do not consider this case to be determinative.

On the basis of the facts summarized above, I conclude that Crawford was a supervisor within the meaning of Section 2(11) of the Act.

b. The alleged violation of Section 8(a)(1)

The complaint alleges that on or about June 6, 1997, Respondent, by Dan Crawford, unlawfully threatened employees with unspecified reprisals for engaging in union activities.[13]

The record shows that on about June 6, 1997, Supervisor Crawford told employee Hanscom that he was going to "stop" Hanscom and "have the Union thrown out." This was an unlawful threat under established Board law, and violated Section 8(a)(1).

c. The alleged discrimination against Hanscom

The General Counsel has the burden of establishing a prima facie case that is sufficient to support an inference that protected conduct was a motivating factor in an employer's decision to discipline an employee. Once this is established, the burden shifts to the Respondent to demonstrate that the discipline would have been administered even in the absence of the protected conduct.[14]

Respondent's animus against the Union is established by Crawford's unlawful threat described above, and by Respondent's other unfair labor practices described hereinafter. Accordingly, the General Counsel has established a prima facie case.

Respondent has not shown that Hanscom engaged in any conduct that warranted discipline. In the case of Felder, the credited record shows that Felder threatened Hanscom with bodily harm after the latter refused to cross a divided highway and engage in "roadside assistance." In the case of Waterbury, instead of penalizing Hanscom for refusing to work on the Mitsubishi, Yanick gave Waterbury a writeup. In the case of Crawford, the supervisor reduced Hanscom's compensation on a job, and then demanded half of the "spiff" which came with the job. When Hanscom agreed, on the condition that Crawford return Hanscom's one-half hour of compensation, Crawford refused and made the unlawful threat described above.

Hanscom had an outstanding record, including selection as technician of the month in 1996. It is unlikely that Respondent would have engaged in the drastic discipline of discharge for the events described above absent Hanscom's strong and visible support of the union movement. Naso wanted to discuss the Union when he told Hanscom on May 21, that similar conduct (the dispute with Felder) would result in Hanscom's discharge, and Crawford stated explicitly that he would have the Union thrown out. I find that by Naso's warning Hanscom that he would be terminated by engaging in the action as described above, and by terminating him on about June 10, 1997, because of his union activities, Respondent thereby violated Section 8(a)(3) and (1) of the Act.

B. The Discharge of Joseph Niciforo

1. Niciforo's employment history and union activities

Joseph Niciforo had been employed in automotive repair work for 40 years, and held certifications from the National Institute for Automotive Service Excellence as a master automobile technician in various fields—engine repair, automatic trans/transaxle, manual drive train and axles, suspension and steering, brakes, electrical/electronic systems, heating and air-conditioning, and engine performance.[15] He had three periods of employment with Respondent—from June 1995 until April 1996, from June 1996 until November 1996, and from April 1997 until he was discharged on June 20, 1997. Respondent's general manager, Thomas Naso, used Niciforo to repair and inspect Naso's personal vehicle.

Niciforo signed a Local 119 authorization card on April 12, 1997, and attended several meetings. Naso wrote Niciforo a note saying that it was important for him to get Niciforo's support, and that he should "vote (his) instinct."[16] About 2 or 3 weeks before the May 23 election, Naso approached Niciforo and asked him what he thought about the Union. Niciforo replied that he was in favor of it—he had been in the automotive repair business for 40 years, and had nothing to show for it. According to Niciforo, Naso did not want to hear what Niciforo had to say. "He just blew me off." After the election, Niciforo started wearing a union hat, and was seen doing so by various supervisors.

2. Niciforo's discharge

Niciforo was discharged on June 20, 1997, assertedly for negligence in repair of an automobile. The Company had taken in a 1996 Saturn as a trade-in on the sale of another vehicle, and on April 22, 1997, Niciforo was assigned the job of preparing it for resale. Niciforo did so; the car was placed on Respondent's used car lot and was sold about 6 weeks later.

On June 16, Niciforo was called into Lombardo's office, where Lombardo and Yanick told Niciforo that the purchaser of the Saturn had taken it out, and that it would not move because of a problem with the brakes. Niciforo was informed that the

[13] GC Exh. pars. 6(a), 10.

[14] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

[15] GC Exh. 37.

[16] GC Exh. 40.

car was at a Saturn dealership, which at that time was also owned by Respondent's owner. Niciforo testified that it was customary to return a car that had been worked on, but still had troubles, to the technician who had worked on it. Respondent's explanation was that the car broke down at night. Niciforo told the supervisors that it was impossible for this to have happened. Service Manager Yanick replied that "it did happen," sent Niciforo home, and discharged him on June 10.

The automobile was repaired at the Saturn dealership, and Respondent presented evidence as to what was wrong with it. The work order shows that the purchaser said the car made a loud noise and would not move forward.[17] Respondent's director of fixed operations, Rodney Carter, concluded that the car had stopped because the caliper had swung against the rim, and did so because the bottom bolt had not been tightened. Respondent also presented Saturn's service department manager, John Herberchs, who testified that the top bolt of the caliper had come lose. Both witnesses concluded that the bolt had not been tightened. Respondent introduced photographs from a Saturn repair manual to support this testimony.

Niciforo then testified again, and disputed Respondent's evidence, noting the conflict as to which bolt allegedly came out. His work order shows that he had to "cut the rotors."[18] Since the car had only a little over 19,000 miles, he did not have to take the caliper apart. He simply loosened the suspension bolts and lifted it off the rotor. He then "rounded" the rotor, and put the parts back.

Niciforo was specific on his next procedure. He cleaned the mounting bolts, and applied a "locking agent" to them. Using his own torque wrench, he fastened the bolts using the prescribed pressure. Niciforo said that he had done this innumerable times during his 40 years as an automobile technician, and it was "impossible" that he could have deviated from this habitual function. He then gave the automobile a test drive for 10 to 20 miles. If the caliper had been loose, it would have rattled every time he stepped on the brakes—there was no such noise.

3. Factual and legal conclusions

The record shows that Niciforo was an exemplary employee. He had numerous certifications as a master automobile technician in various fields, including brakes. Of the various technicians employed at Respondent's facility, he was selected by the general manager to inspect and repair the general manager's personal vehicle.

Niciforo's testimony as to his repair of the Saturn was detailed and persuasive. There was nothing unusual about tightening the bolts—he had been doing it for many years. Section 406 of the Federal Rules of Evidence states:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Respondent's evidence is not persuasive. After Niciforo repaired the Saturn, it sat on Respondent's used car lot for about 6 weeks, and was then sold. It was not examined again prior to sale, and there is no evidence that it was in the same condition as it was after Niciforo repaired it. It could have been repaired again by mistake, which happened in the case of employee Dennis Nyugen, who replaced an engine on a Renault that did not have any engine problem.[19] The purchaser of the Saturn did not testify, and we thus do not know why he had the vehicle towed to a Saturn dealership—owned by the same individual who owned the Ford dealership, Respondent herein—rather than back to the place where he purchased it, which was the customary practice. Respondent's reason—the vehicle "locked up" at night—is unpersuasive. The Saturn dealership was only a few miles away from the Ford agency, and it was obviously the same time of night there.

Niciforo's work record and expertise and his selection by Respondent's general manager as the latter's personal technician, have greater probative weight than Respondent's evidence with its ambiguities and omissions. I conclude that Niciforo's account of his repair of the used car was truthful.

Respondent did not bother to investigate. It simply accepted the reports from the Saturn dealership, and discharged Niciforo.[20] The latter's union sympathies were known to Respondent. General Manager Naso asked Niciforo for his support, and was rejected. I conclude that the reason given for Niciforo's discharge was a pretext and that the real reason was his support of the Union. Accordingly, his discharge was violative of Section 8(a)(3) and (1).

4. The discharge of Eton Leung

a. Leung's employment history and union activities

Eton Leung had 20 years of experience as an automotive technician. He was employed from February 1997 until April 29, 1998, when he was discharged. Leung was a certified technician in steering, suspension, air-conditioning, engine repair, and brakes. He signed a union authorization card on April 14, 1997, and attended six to eight union meetings. Leung wore a union hat at work in June and July 1997. He participated in union picketing and handbilling outside Respondent's facility in December 1997, and signed an employee petition presented to management in February 1998. Service Director Riker testified that, other than the incident that precipitated Leung's discharge, Riker could not recall any problems with Leung. Riker testified that he told the owner of the car involved in this incident that Leung was a "great" employee. Riker could not recall any problems with attendance, initiative, or quality of work. He testified at the hearing that Leung was a "good" employee. Yet after Leung's discharge Riker rated Leung as "unsatisfac-

[17] R. Exh. 39.

[18] GC Exh. 6.

[19] Testimony of George Brodhurst.

[20] Hanscom testified that he was requested by Yanick to investigate a vehicle that had been worked on by another employee and had burned up. Hanscom determined that the cause was the other employee's failure to remove a fuel pressure regulator about which the manufacturer had issued a recall notice. The other employee was not disciplined.

tory" in job knowledge and quality of work, and "fair" in attendance, cooperation, and initiative.[21]

b. Leung's discharge

On April 29, 1998, dispatcher Victor Bunce assigned Leung a repair job on a Jeep, for which the customer was waiting. Leung had another vehicle on his lift, and could not do the work right away. Bunce then told Leung to place the Jeep on one of Waterbury's lifts, since Waterbury was not there and both lifts were vacant. Leung did so. Waterbury arrived and cursed Bunce and Leung.

Leung finished the job on the Jeep, which required an oil change and a wheel rotation. When he finished, he drove the Jeep about 50 yards to the location where customers pick up their vehicles. Leung did not see the customer take possession of the Jeep. He turned in his papers, and went back to his former job. About half an hour later, the Jeep was brought back to the facility on a tow truck. The right front wheel appeared to be crooked, and it was Leung's opinion that it was not driveable. He called the owner, who said that she heard a noise, and stopped driving the car.

Leung testified that he had put the wheel lugs on with an air gun, which he had done hundreds of times previously. He had never before been accused of failing to tighten lug nuts.

Service Director Riker told Leung that the wheel had fallen off. Leung replied that this could not have happened and that somebody must have taken the wheel off, but Riker would not listen. Two days later, Riker called him and said he did not want Leung working there any more.

Service Director Riker testified that a service advisor told him that a customer had picked up a car, and that a wheel had fallen off. Riker walked out of the facility onto the boulevard, and observed the Jeep. Riker stated that he picked up three lug nuts as he crossed the street toward the Jeep. It was brought back to the facility and examined. Riker testified that the lug nuts showed that they had been placed on only to the extent of two or three threads, and had obviously "popped off" when the customer attempted to turn the vehicle.[22]

Riker asserted that he asked Leung whether he knew how this could have happened, and Leung replied that he did not know. Riker told Leung that the Company had "zero tolerance" for negligence. He denied that Leung had suggested that Waterbury had done anything to the Jeep after Leung worked on it. Riker concluded that, although Leung had a "clean record," he had to be discharged pursuant to the Company's policy of "zero tolerance" for negligence.

On cross-examination, Riker testified that in August 1997, a wheel fell off a vehicle on which employee Dennis Nyugen had worked. The car was parked overnight at the dealership after being repaired, and the customer picked it up the next morning. A wheel fell off after she had driven it less than 200 feet. Riker interrogated Nyugen, who told him that he remembered tightening the lug nuts on all four wheels. He gave the car a 2-mile road test.

[21] R. Exh. 28.
[22] R. Exh. 27.

According to Riker's pretrial affidavit, during his investigation of this matter, a few "openly pro-union technicians" asked him whether Nyugen was going to be treated the same way as Niciforo. At that point, according to the affidavit, Riker became suspicious of a "set-up" in Nyugen's case. There was no way that Nyugen could have driven the car for 2 miles with loose lug nuts. "After careful investigation," Riker's affidavit states, "I concluded Mr. Nyugen was the victim of a set-up."[23]

At the hearing, Riker initially denied being asked by "pro-Union" employees whether Nyugen was going to be treated the same way as Niciforo, and denied knowing that they were "pro-Union" employees. He distinguished Leung's case from Nyugen's, because in the latter instance the vehicle had remained at the facility for 3 days, and there were "break-ins," and wheels, tires, and radios taken.

c. Factual and legal conclusions

The credible evidence shows that Leung was a commendable employee. His testimony to this effect was corroborated by Riker, who called him a "good" employee, and told the Jeep owner that he was "great." Riker's contrary opinion expressed in his termination report of Leung has no probative weight, other than to underscore Respondent's animus against union supporters. Leung's union activities were extensive, and included handbilling, picketing, and signing an employee petition to management. These latter events took place only a short time before he was discharged. The General Counsel has established a prima facie case.

Respondent's asserted case for Leung's discharge has gaps in it. After Leung finished his work, he drove the Jeep 50 yards to the area where customers picked up their cars. Leung did not see the customer in this instance, and an opportunity existed for somebody to loosen the lug nuts—a matter, which could have been accomplished in a very short period of time. The lug nuts submitted by Respondent show tearing of the first three or four threads, as Respondent argues. Assuming that they were from the Jeep, this would have been the same result if they were originally affixed tightly, and later loosened. An inference that they were affixed properly in the first place is supported by Leung's 20 years of experience as a technician, his "habit" of tightening the lug nuts, and the absence of any complaints about him.

When Leung told Riker that somebody else must have taken the wheels off (or loosened the lug nuts) the supervisor would not listen. And yet, in the case of Dennis Nyugen, Riker arrived at precisely that conclusion—Nyugen was the victim of a "set-up." Riker's conclusion was precipated by "pro-Union" employees asking him whether Nyugen was going to be faced with the same result as Niciforo. Although Nyugen's union sympathies are unknown, it is clear that Riker's action was precipitated by "pro-Union" employees challenging him about the matter. Riker's testimony about this issue is suspect—he exaggerated the time that the car in Nyugen's case remained at the facility, and his rationale for possible loosening of the lug nuts—theft of tires, radios, etc.—is farfetched.

[23] GC Exh. 65.

Although the Nyugen incident is not identical with Leung's, it is closely similar. Riker's exoneration of Nyugen and his administration of the harsh discipline of discharge of Leung belie Respondent's assertion that it had "zero tolerance" for negligence. It is established Board law that discipline of one employee for alleged misconduct, and exoneration of another for the same alleged misconduct, constitute evidence of discriminatory motivation. *Southwire Co. v. NLRB*, 820 F.2d 453 (D.C. Cir. 1987).

I conclude that the reason for Respondent's discharge of Eton Leung was pretextual, and that the real reason was his support of the Union. Accordingly, the discharge violated Section 8(a)(3) and (1) of the Act.

IV. THE ALLEGED VIOLATIONS OF SECTION 8(A)(1) IN LATE 1997

A. The Statement of General Manager Thomas Naso and Service Director George Riker in Mid-November 1997

On November 5, 1997, Local 119 President Joseph Merino sent Respondent a letter notifying the latter that Pat Tucci was the shop steward and Chuck Leverette the assistant shop steward.[24] As noted above, on November 14, 1997, Merino sent the Company a letter informing it that the Union's certification had been received, and requested bargaining.[25]

The complaint alleges that on November 18, 1997, both General Manager Thomas Naso and Service Director George Riker told employees that the Union was not their bargaining representative, and that Respondent would not deal with the Union or its shop steward.

It also alleges that Naso threatened employees with discharge for engaging in union activity. Union Steward Tucci testified that on about November 18, 1997, employee Jeff Fitzgerald told Tucci that Respondent was refusing to pay him for work performed; Fitzgerald requested Tucci's assistance. The two employees went to Riker's office, but he was busy and they went back to their work areas. About 45 minutes later, Riker came out to Fitzgerald's work area. Tucci's work area was next to Fitzgerald's, and he heard Fitzgerald tell Riker that Tucci had asked to be present at the meeting between Riker and Fitzgerald. Riker replied, "No way," and came over to Tucci's work area. "There's no Union here," he yelled at Tucci, "and you're not the f–king shop steward." Fitzgerald was then called to Riker's office. I credit Tucci's uncontradicted testimony.

After speaking with Fitzgerald, Riker told Tucci to accompany him to General Manager Naso's office. When they entered the office, Naso told Tucci that there was no union at the facility, and that Tucci was not the shop steward. Tucci handed Naso copies of the Union's notification to Respondent of its certification and the notice identifying Tucci as the shop steward. Tucci asked Naso whether he had received these documents, but Naso did not reply. He told Tucci that he did not "appreciate Tucci counseling the men," that he had a "bad attitude," and that he would terminate Tucci if he kept it up. Naso testified that he considered a writeup for Tucci, because he became "involved in other technicians' business with regard to other technicians' employment." This constituted corroboration of Tucci's testimony, which I credit.

I conclude that Riker's and Naso's statements to Tucci that they would not recognize the certified Union or its appointed shop steward, and Naso's statement to Tucci that he would be discharged if he continued to be involved in the employment problems of Respondent's employees, constituted violations of Section 8(a)(1).

B. General Manager Naso's Statements on December 15, 1997

The complaint alleges that General Manager Thomas Naso, on December 15, 1997, solicited employees to deal directly with Respondent regarding raises, promised employees raises if they would not support the Union, and told them that it would be futile for them to support the Union.

The General Counsel presented three witnesses on statements made by General Manager Thomas Naso at an employee meeting in mid-December 1997. The meeting was also addressed by Respondent's owner, Ted Morse. According to Pat Tucci, Morse said that the Board was in error, and that he was going to "fight them to the end."

Employee Charles Leverette testified that Naso said Morse had given him authority to renegotiate wages, that Naso had an open-door policy, and that any employee wanting a raise should see him on a "one-to-one" basis. He repeated Tucci's testimony that Morse said the Company was going to fight the NLRB, and that it had made a mistake in certifying the Union.

Eton Leung testified that Naso said the employees did not need a union, because they could come into Naso's office and solve whatever problems they had, including the need for a salary increase. The Company's dealing with the Union could take "years" to resolve, according to Leung.

After the meeting was over, Naso called Tucci into his office, and told him Tucci wasn't the shop steward, and that if he kept it up, Naso would discharge him. Naso added that Ed Morse had the money to "keep this tied up forever," and that he would never negotiate a contract, no matter what the NLRB says. . . . No one's going to tell him how to run his business and negotiations were never going to happen now, no how, no way."

I credit this consistent testimony as to what Owner Ted Morse and General Manager Thomas Naso said to employees in mid-December 1997. Naso's statements establish the complaint allegations that Respondent solicited employees to deal directly with Respondent regarding raises, and told them that it would be futile for them to support the Union. The evidence does not explicitly establish that the Company promised employees raises in return for their rejection of the Union, and I consider it unnecessary to make a finding on this allegation.

I conclude that Naso's statements violated Section 8(a)(1).

V. THE MERGER OF LOCAL 119 AND NOITU

A. The Complaint Allegations

The amendment to the complaint alleges that on January 1, 1998, Local 119 merged with its parent, NOITU, and that since that time NOITU has been the collective-bargaining representative of the employees in the unit described above. Prior to that

[24] GC Exh. 16.

[25] Supra, fn. 4.

time, beginning November 14, 1997, Local 119 was such representative.

The amendment also amends section 9(a) and (b) of the last complaint[26] so as to aver that Respondent in December 1997 gave wage increases to certain employees, including Dominique Marchetto, Frank Waterbury, and Tom Vanlit, and on January 21, 1998, issued a memorandum to employees reducing their rates of pay effective February 1, 1998—without prior notice to the Union and without affording it an opportunity to bargain concerning these matters.

B. The Merger

The General Counsel presented the testimony of Local 119 President Joseph Merino, and that of Daniel Lasky, president emeritus elect of NOITU.[27] Lasky gave Merino the requirements for a merger. Pursuant to these instructions, Local 119's executive board met on November 3, 1997, and unanimously decided to merge with NOITU.[28]

All Local 119 members were notified by mail on November 15, 1997, to attend the annual membership and executive board meeting in order to act upon a recommendation of the executive board that Local 119 merge with NOITU. The meeting was to be held in Elmhurst, New York, on December 6, 1997.[29]

Local 119 had two contracts and about 30 members in Florida. Merino, as Local 119's president, serviced those contracts. He testified that he spoke to all the Florida members before the formal notice went out, and told them that they would be receiving a notice concerning merger with NOITU, and that they could call him if they had any questions.

The membership meeting took place as scheduled on December 6, 1997, in Elmhurst, New York. A roll call was taken and a quorum was present. Merino chaired the meeting, and explained its purpose. Questions were asked and answered. Merino explained that the Local was in financial difficulty, and needed the merger for financial stability. He asked whether the members wished to take a secret vote, and a majority opposed it, since many were truckdrivers who wanted to get on with their work. Merino conducted a vote by a show of hands. All members voting voted in favor of the merger, and there were no opposing votes.[30]

The general membership meeting of NOITU took place at the same location shortly after the conclusion of the Local 119 meeting. Lasky reported to the membership the vote of Local 119 to seek merger with NOITU.[31]

On December 8, 1997, Lasky sent notice to all members of NOITU's executive board announcing a meeting of the Board on December 14, 1997, for the purpose of acting on the requested merger agreement.[32] The meeting was held as scheduled. Lasky chaired this meeting, and read a proposed merger agreement between NOITU and Local 119. The agreement was approved unanimously.[33] Thereafter, a merger agreement effective January 1, 1998, was signed by Merino, representing Local 119, and Lasky, representing NOITU. It states that Local 119 went out of existence.[34]

Subsequent to the merger agreement, Merino became the eastern southern representative of NOITU, and continued to service the same Florida contracts, which he had serviced as Local 119's president. He was paid by NOITU. Brian Pepper, who serviced other Local 119 contracts, continued to service them as a national representative of NOITU.

Following the merger, Merino filed a charge on February 26, 1998, in Case 12–CA–19329, alleging the unlawful discharge of Henry Brodhurst on February 20, 1998. The charging party was listed as "Local 119 affiliated with National Organization of Industrial Workers," and a space for affiliation lists the latter organization.[35]

On March 31, 1998, Local 119 counsel wrote Respondent a letter demanding bargaining in Case 12–CA–19194, pursuant to the Board's Order date March 23, 1998; the reference part of the letter lists "National Organization of Industrial Trade Unions Local 119."[36]

On April 14, Respondent's counsel replied that the Board had erred in refusing to grant Respondent a new election, and that the Board's Order was not binding on Respondent. Accordingly, Respondent declined "to meet and bargain with representatives of NOITU or its Local 119 Labor Organization."[37]

Merino thereafter filed various charges listing Local 119 as the charging party.[38]

Merino was cross-examined on whether Local 119 had in fact ceased to exist on January 1, 1998. He replied that this was technically correct, but that there were papers he had to deal with for the Board and that he had been acting as president of Local 119 for 37 years. On redirect examination, Merino testified that he had a stroke 2 years before the hearing, i.e., in about January 1997, and that it affected his short-term memory.

C. Legal Conclusions

A merger or affiliation of a certified union with a national organization does not affect the employer's duty to bargain with the postaffiliation union.[39] An employer seeking to avoid this obligation has the burden of establishing that the affiliation was not accomplished with minimal due process, or that the postaffiliation union lacked substantial continuity with the preaffiliation union. *CPS Chemical Co.,* 324 NLRB 1018 (1997); *Sullivan Bros. Printers,* supra; *Minn-Dak,* supra; *Quality Inn Waikiki,* 297 NLRB 497 (1989); *May Department Stores Co*.,

[26] GC Exh. 1(hh).

[27] Lasky had been a member of NOITU's executive board since 1972.

[28] GC Exh. 12.

[29] GC Exh. 5. Local 119 had contracts and members in New York and Florida.

[30] GC Exh. 6; testimony of Lasky.

[31] GC Exh. 7.

[32] GC Exh. 8.

[33] GC Exh. 9.

[34] GC Exh. 10.

[35] GC Exh. 1(s).

[36] R. Exh. 3.

[37] R. Exh. 3(a).

[38] First amended charge, Case 12–CA–19329, filed September 18, 1998; original charge, Case 12–CA–1947–1 filed May 4, 1998.

[39] *Minn-Dak Farmers Cooperative*, 311 NLRB 942 (1993); *Toyota of Berkeley*, 306 NLRB 893, 893, 894 (1992); *Sullivan Bros. Printers,* 317 NLRB 561, 562 (1995); and *Action Automotive*, 284 NLRB 251, 254 (1987).

289 NLRB 661, 664–665 (1988), enfd. 897 F.2d 221 (7th Cir. 1990).

Respondent argues that the merger process deprived Local 119 members of adequate due process safeguards, and, accordingly, the merger was not effective. The Company contends that the Florida members were given inadequate notice of the meeting to be held in New York, and that no effort was made to hold a separate meeting for the Florida members.[40] On the contrary, all members were given about 3 weeks' notice to attend the meeting. Respondent's argument that NOITU and Local 119 should have held another meeting in Florida has no merit, and its contention that the Florida members had no opportunity to consider the merger is inaccurate. Prior to the official notice of the membership meeting, Local 119 President Merino discussed the merger vote with the Florida members, and invited questions. And, of course, all Florida members did receive official notice of the membership meeting. The fact that the meeting was not attended by all members did not affect the due process of the meeting. A quorum was present. A contrary position would enable any minority to defeat the will of the majority by simply failing to appear.

Respondent next argues that the merger vote was invalid because it was taken by a show of hands, rather than by secret ballot, citing *State Bank of India*, 262 NLRB 1108 (1982). However *State Bank* involved the merger of two local unions. When a local is merging with its parent organization, a secret vote is not required. *Aurelia Osborn Fox Memorial Hospital,* 247 NLRB 356 (1980); *House of the Good Samaritan*, 248 NLRB 539 (1980). The same rationale is applicable to the Company's argument that NOITU did not keep a record of the employees attending the meeting.

Respondent argues that the members were not provided with a copy of the merger agreement. However, the record is not clear on this allegation. In any event, Merino answered questions about the proposed agreement, and Respondent has submitted no evidence that these answers failed to give the members adequate knowledge of the proposed merger.

The requirement that the postaffiliation union have substantial continuity with the preaffiliation union was obviously satisfied. Indeed, Joseph Merino and Brian Pepper continued in the same functions they had prior to the merger. Respondent has conceded that it does not question the substantial continuity part of the rule.[41]

Respondent's argument that there was a lack of due process because nonunion Technicians employed by Respondent were not given an opportunity to vote has no merit. *NLRB v. Financial Institution Employees Local 118 (Seattle First National Bank),* 475 U.S. 192 (1986). The Board has subsequently concluded that a union's failure to give employees who are not union members an opportunity to vote in an affiliations election does not establish a lack of due process.[42]

I conclude that Respondent has failed to meet its burden of establishing that the merger was accomplished without minimal due process, or that the postaffiliation union lacked substantial continuity with the preaffiliation union.

Finally, Respondent argues that it has no obligation to bargain with Local 119, because the latter ceased to exist after the merger, nor with NOITU, since the Company never received a bargaining demand from the latter and had no notice of the merger.[43]

The Board has found that Respondent unlawfully refused to bargain prior to the merger. On Respondent's theory of the case, this unfair labor practice, as well as the numerous violations found, must simply remain unremedied. If Respondent had responded affirmatively to Local 119's premerger demand for bargaining, it is probable that it would have learned of the merger. The Company's unfair labor practice thus contributed to its lack of notice of the merger.

Respondent's argument has been disposed of by the Fifth Circuit Court of Appeals. In *Houston Coca-Cola Bottling Co.*, 265 NLRB 766 (1982), enf. as modified 740 F.2d 398 (5th Cir. 1984), a local Teamsters union, Local 949, filed a charge alleging that the employer had committed various unfair labor practices, and the Board so found. Subsequent to the Board's Decision, Local 949 merged with another labor organization, Local 988, and the employer filed motions for reconsideration. The Board denied the motions, and held that Local 988 could appear on the ballot in a second decertification proceeding as "the valid successor" to Local 949 (740 F.2d at 402). The decision of the court of appeals reads in relevant part as follows:

> The Company also contends that the merger of the Union with Local 988 effectively renders the Board's order moot because it is directed at the Company's conduct relative to Local 949, and Local 949 no longer exists.
>
> When the Board finds that unfair labor practices have been committed, it is entitled to have its order enforced by the Courts to prevent a recurrence of that unlawful conduct in the future. In this manner, the Board and the courts vindicate the statutory right of employees to freely choose a bargaining representative (authorities cited), and the public interest in preventing unfair labor practices (authority cited). Doubt as to the existence of Local 949 and the validity of the successor's affiliation election should not be permitted to excuse the Company's *previous* unlawful conduct (authority cited). . . . [T]ermination of Local 949's status as the authorized bargaining representative and doubt as to Local 988's status as successor cannot be permitted to pretermit enforcement of an order aimed at preventing future misconduct (authority cited).
>
> We conclude that enforcement of the Board's Order would best effectuate the statutory purpose of protecting the right of the Company's employees to freely choose a bargaining representative. Allegations of impossibility of compliance have not prevented courts from enforcing Board orders against employers who have discontinued their business operations (authorities cited). Thus, the

[40] R. Br. 7.

[41] R. Br. 8.

[42] *George Lithograph*, 305 NLRB 1090 (1992); *Potters Medical Center***,** 289 NLRB 201 (1988). See also *Hamilton Tool Co*., 190 NLRB 571 (1971).

[43] R. Br. 10–11.

> public interest in prohibiting and discouraging the commission of unfair labor practices is no less critical in cases where union representation has ceased or changed, despite the Company's allegations that it has been ordered to "perform an impossible act." [740 F2d at 406.].

Paragraph 1(a) of the administrative law judge's recommended order in *Houston Coca-Cola* had required the company to cease and desist from certain unlawful conduct (265 NLRB at 784). The court of appeals modified this language so as to require that the cease-and-desist order run against Local 949 or its successor, Local 988, Teamsters, should it be deemed the successor to Local 949 as the result of the pending representation proceeding (and) shall be referred to as the "Union." (740 F.2d at 407.)

In the case at bar, the labor organization into which Local 119 merged was its own parent, the International. I conclude that NOITU was the successor to Local 119 and that, as alleged in the amended complaint, Respondent was precluded from engaging in the unlawful conduct alleged in the amended complaint.

VI. RESPONDENT'S WAGE RAISES TO CERTAIN EMPLOYEES

General Manager Thomas Naso testified that Respondent gave pay raises to four employees in mid-December 1997.[44]

As set forth above, Respondent granted these raises at about the same time that Respondent unlawfully solicited employees to apply for wage raises without the Union's assistance, and also told them that the NLRB had made a mistake in certifying the Union, that Respondent was going to fight it, and that Owner Ted Morse had enough money to keep the matter tied up forever and would never negotiate a contract. Respondent advanced no reason for granting the wage raises in December 1977. General Manager Naso admitted that the Union was not consulted. He testified that a technician does not get a raise unless he asks for one. Service Director Riker testified that he considers factors such as ASE certifications, Chrysler training, productive and work habits, but admitted that he had not started any yearly reviews at the time of the increases.

Charles Leverette began working for Respondent in 1995. He was a certified master technician. He signed a union card, and began wearing a union hat after the May 23, 1997 election. Leverette asked for a raise twice, but was denied. He testified that he was talking with Service Manager Bill Yanick in early June 1997 about a transmission problem. Yanick told him that he (Yanick) had an authorization to give raises, but could not give them out because of the union activity. Yanick had a piece of paper with names and numbers on it. He told Leverette that the latter had "lost," and could have made up $23 hourly.

Respondent argues that the raises were not unlawful, because Respondent was simply following its policy of granting raises to employees who asked for them, and whose record justified it.[45] However, Respondent's asserted policy was only announced by Owner Ted Morse in mid-December 1997, after Local 119 had filed unfair labor practice charges. Respondent's argument that raises were granted if warranted was obviously incorrect in the case of Charles Leverette, a certified master technician, who asked but was denied. I infer that the fact that Leverette was Local 119's assistant steward was a factor in Respondent's denial of his requested raise.

The pay raises were selective in nature, since other employees did not receive them and they did not follow any prior pattern of raises. Based on these factors, Respondent's failure to consult the Union, and its hostility to the union movement, I conclude that the raises were intended to discourage employees from participating in the union movement, thus violating Section 8(a)(1), (3), and (5). *Chosun Daily News*, 303 NLRB 901 (1991); *Dlubak Corp*., 307 NLRB 1138 (1992); *Dickerson-Chapman, Inc.,* 313 NLRB 907 (1994), Section 8(a)(3); and *NLRB v. Walker Construction Co.,* 928 F.2d 695 (5th Cir. 1991), Section 8(a)(5).

VII. THE SALARY REDUCTION AND THE DISCHARGE OF HENRY BRODHURST

A. The Salary Reductions

On January 21, 1998, Respondent issued a memo to employees stating that technicians would be paid only at factory authorized time for vehicles covered by the extended warranty companies, effective February 1, 1998.[46] As indicated previously, this meant that technicians would be paid for a lesser amount of time on a specific job, and would thus lose pay. Charles Leverette and Henry Brodhurst explained what the reduction meant in dollar terms. Thus Brodhurst testified that he would lose $100 per job for a transmission overhaul.

B. The Discharge of Henry Brodhurst

1. Brodhurst's employment history and union activity

Brodhurst began working for Respondent in April 1997. He signed a union card that month, and attended at least a dozen union meetings. He spoke to employees concerning antiunion literature being distributed to employees by the Company, wore a union hat, and on May 16, 1997, distributed copies of a letter to General Manager Naso in response to the Company's literature. He testified for the Union on June 25, 1997, in the hearing on objections, and participated with other employees in picketing the Company for several weeks starting in December 1997. In mid-February 1998, at a meeting being addressed by Ernie Ferency, the Company's senior vice president of operations, he spoke out against the pay cuts.

2. The transmission job

About a week after the meeting with Ferency, Brodhurst received a transmission job. There is conflicting evidence on several colloquies involving Brodhurst, Service Director Riker and service writer Don Hamilton. The job was ordered by a private insurance company. Brodhurst submitted an estimate of

[44] Thomas Vantil, $16.50 to $17.50 (GC Exh. 31); Dominic Marchetto, $16.50 to $17.50 (GC Exh. 32); Jim Matis, $17 to $18 (GC Exh. 33); Frank Crugliano, $14 to $15, and to $16 in 90 days (GC Exh. 34).

[45] R. Br. 17.

[46] GC Exh. 21.

16.5 hours as the time required, but Hamilton approved it for only 11 hours. When Brodhurst asked the reason, Hamilton replied that it was Chilton's factory warranty time. Brodhurst asked Hamilton to negotiate with the insurance company, but Hamilton refused. (Brodhurst testified that he had done this in the past.) Brodhurst asked Hamilton to get Service Director Riker. The latter appeared, but also refused to call the insurance company. Brodhurst asked for a meeting with the general manager, but Riker refused. At either this or a later meeting with Riker, Brodhurst said, "George, if I can't get it resolved here, I'll just have to call the Labor Board and find out from them how to go about handling this issue."

Brodhurst returned to his workstation. He disassembled the transmission, put in a handcart, and took it to the cleaning bin in the late afternoon. Hamilton approached him and asked when the transmission would be ready and whether Brodhurst had ordered any parts. Brodhurst replied that he did not have to order any parts, and that the transmission would be ready early the following week. He asked Hamilton whether the latter had called the customer, and offered to do this for him. Hamilton became "agitated," claimed that he had already done this three times, and said that Brodhurst was accusing Hamilton of not doing his job. "I don't give a damn about you and your Union shit," Hamilton stated, according to Brodhurst. He "leaned forward in my face, "and stuck out his chest." Brodhurst testified that he walked away from Hamilton, towards his toolbox.

Hamilton testified that he saw Brodhurst washing the disassembled transmission in the wash basin, and asked him when it would be ready. Brodhurst asked whether Hamilton had renegotiated the job, and the latter denied doing so. At that time Brodhurst was washing the transmission in the wash basin, but Hamilton claimed he was approaching Hamilton in an aggressive manner. Hamilton asserted that Brodhurst threw something at him, but admitted that Brodhurst had nothing in his hand at the time. Hamilton denied telling Brodhurst that he, Hamilton, had called the customer three times, or that he had told Brodhurst he didn't give a damn about Brodhurst's union business.

The work area of George Brodhurst, Henry's brother, was nearby. He testified that Hamilton started shouting, and said, "I don't give a [damn] about your damn Union." Henry then started walking toward his toolbox, and Hamilton followed him, "still yapping, yapping, shouting and screaming."

Henry Brodhurst testified that, as he was approaching his toolbox, Riker appeared and asked Brodhurst what had taken place, and what Brodhurst had responded upon Hamilton's asking when the transmission would be ready. "Wednesday" (of the following week), Brodhurst answered. Riker than told him to lock up his box and go home. This was the second conversation Brodhurst had with Riker on that day.

Riker's testimony on this matter appears to confuse the first and second meetings. The service director asserted that Brodhurst approached him with an air ratchet in his hand in a threatening manner, and was shouting. Riker could not remember whether Brodhurst was holding the air ratchet up in the air, or at his side. Riker testified that he felt threatened, and that threatening an assault is a dischargeable offense. When ssked why he did not discharge Brodhurst at that time, Riker replied, "I didn't feel that threatened." Asked whether Brodhurst's statement that the matter involved a labor dispute occurred prior to the asserted assault, Riker testified that it occurred "at the same time."

After telling Brodhurst to go home, Riker went to James Carr, then general manager. As Riker was speaking with Carr, Brodhurst came to the outer office, and demanded to see Carr. This request was refused. Riker did not tell Carr that Brodhurst had asked to see him. Carr affirmed that he had an "open door" policy, by which employees could see him about disputes.

Riker told Carr that Brodhurst had been abusive and uncooperative, and that Riker had sent him home. Carr agreed, and said that that he would review the matter. These events took place on Friday. On the next day, Saturday, Carr saw Brodhurst at the parts counter. Brodhurst asked Carr whether the latter had made a decision, and the general manager replied that he had not done so.

3. Brodhurst's discharge

On the following Monday, Carr reviewed Brodhurst's file. The earliest discipline was in May 1997. The file contained two documents, neither of which was offered to prove the truth of its contents. The first document was dated in September 1997, and asserts that Brodhurst had a "bad attitude toward employees and manager. Expects us to pay him for walking around looking for cars." Brodhurst refused to sign it.[47] The second document is a warning dated December 16, 1997, which asserts that Brodhurst refused a work assignment and was profane toward a supervisor. Brodhurst did not sign this warning.[48] He testified that he never saw it until the hearing. Carr admitted that he had no personal knowledge of these events.

Carr also interviewed Hamilton, who told him that Brodhurst had refused to work on a car, and that he felt he had been threatened with physical violence by Brodhurst.

On the basis of Brodhurst's file, and the reports to him by Riker and Hamilton, Carr concluded that it was not necessary to review Hamilton's file, although he was aware that Hamilton had a DUI conviction, did not have a driver's license, and was restricted from driving company vehicles. Carr did not feel that it was necessary to ask Brodhurst about the events in issue. He testified that he did not consider Brodhurst to be a "troublemaker," but decided to discharge him based on the record cited above.[49] "That's why we keep personnel folders," he testified.

4. Factual and legal conclusions

a. The salary reduction

A host of Board and court cases have established that it is a violation of Section 8(a)(5) for an employer to refuse to bargain with the certified representative of its employees by unilaterally implementing changes in employment conditions, such as salary reductions.[50]

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[47] R. Exh. 25.

[48] R. Exh. 8.

[49] Carr also relied on a report given him by Riker that another employee had been discharged for an assault upon an employee. Carr had no personal knowledge of this matter.

[50] See, e.g., *Pepsi-Cola Bottling Co. of Fayetteville,* 315 NLRB 882 (1994); *Opportunity Homes,* 315 NLRB 1210 (1994); *Ironton Publica-*

Respondent argues that it owns over 20 dealerships, that the change in compensation, i.e., the change to factory warranty time as the basis of technician compensation, was made universally among the dealerships, and that it did not evidence animus toward Local 119 or NOITU.[51] This argument is irrelevant, since proof of a violation of Section 8(a)(1) and (5) does not require proof of animus, and there is abundant evidence of it in any event. Further, there is no showing that the employees of the 19 other dealerships were represented by bargaining agents.

Respondent next argues that the change in technician compensation did not represent a change in policy, since that policy was to "pay the mechanics for the number of hours authorized by the warranty issuer (either the manufacturer or an extended warranty company). The evidence established that the hours contained in both factory manuals and other sources, such as Chiltons, changed on a regular basis . . . and were effective immediately when changed."[52]

But there is no evidence that the reduction affected by Respondent on February 1, 1998, was an act by the manufacturers or the extended warranty companies—it was solely Respondent's decision. There is nothing in Respondent's official memo to indicate that the manufacturers or warranty companies were responsible. Indeed, the memo tacitly admits that the warranty companies may not have known the amounts by which their required payments—and the technicians' incomes—were going to be reduced. The memo reads in part: "Because the outside warranty companies may not have current warranty information, a legible copy of the charge claims may be requested by the warranty company."[53] Respondent's action was simply a transfer of income from the technicians to the extended warranty companies. I conclude that it violated Section 8(a)(5) and (1).

b. The discharge of Henry Brodhurst

Henry Brodhurst was a certified master technician. He was also one of the foremost proponents of Local 119. Respondent's reaction to this fact is reflected in its September 1997 written warning—Brodhurst had a "bad attitude towards employees and manager."

Brodhurst's discharge followed by a short time the announcement by Ernie Ferency, the Company's senior vice president, of a change in technician compensation. Brodhurst protested this action at the meeting. The change went into effect on February 1, 1998, and Brodhurst was discharged about a week later.

The conflicting testimony about "the transmission job" is set forth above. Hamilton's testimony has elements that affect his credibility. How could Brodhurst approach Hamilton "aggressively" while the former was washing a 200-pound transmission in the wash basin? How could Brodhurst have thrown something at Hamilton if Brodhurst had nothing in his hand? Brodhurst was corroborated by his brother as to Hamilton's actions and statements. It is of course true that the corroborating witness *was* his brother—but Hamilton had none. I credit Brodhurst's account of his encounters with Hamilton.

Riker's testimony has similar inconsistencies. Although Brodhurst allegedly threatened him with an air ratchet, Riker could not remember whether Brodhurst had it up in the air or was simply holding a tool in his hand. Asked why he did not discharge Brodhurst then for the dischargeable offense, Riker replied that he "didn't feel that threatened," and gave Brodhurst a work order.

And yet it was on the accounts of Riker and Hamilton that General Manager Carr made his decision to discharge Brodhurst—without even asking for Brodhurst's account of the matter. Carr also relied on Brodhurst's file, which contained documents not intended at the hearing to establish the truth of its contents.

Carr's action in this matter is a glaring example of an employer's failure to conduct a fair investigation of alleged employee misconduct. Under established Board law, this constitutes evidence of discriminatory motivation. I conclude that the General Counsel has established a prima facie case, and that Respondent has not rebutted it. Accordingly, Brodhurst's discharge violated Section 8(a)(3) and (1).

In accordance with findings above, I make the following.

CONCLUSIONS OF LAW

1. Respondent Morse Operations Inc., d/b/a Ed Morse Auto Park is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. National Organization of Industrial Trade Unions is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct, Respondent violated Section 8(a)(1) of the Act:

(a) Telling one of the Union's proponents that it was going to "stop" him, and have the Union "thrown out."

(b) Telling employees that there was no union at the facility at a time when National Organization of Industrial Trade Unions was the employees' bargaining representative, and telling its shop steward that he was not the steward.

(c) Telling employees that they would be discharged for engaging in union activity.

(d) Soliciting employees to deal directly with Respondent regarding raises and terms and conditions of employment.

(e) Telling employees that it would be futile for them to support the Union as their bargaining representative.

4. Respondent violated Section 8(a)(1) and (3) of the Act by engaging in the following conduct because the employees involved engaged in union activity and assisted the Union:

(a) Warning employee Peter Hanscom, and, on June 10, 1997, discharging him.

(b) Discharging employee Joseph Niciforo on June 20, 1997.

(c) Discharging employee Henry Brodhurst on February 20, 1998.

(d) Discharging employee Eton Leung on May 1, 1998.

5. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

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tions, Inc., 313 NLRB 908 (1994); *Days Hotel of Southfield*, 311 NLRB 856 (1993); *Sierra Realty Corp.,* 317 NLRB 832 (1995).

[51] R. Br. 17.

[52] R. Br. 17–18

[53] GC Exh. 21.

> All full-time and regular part-time technicians employed by Respondent at its facility located at 3703 N. Lake Boulevard, Lake Park, Florida, excluding all other employees, office clerical employees, managing employees, and supervisors as defined in the Act.

6. On January 1, 1998, National Organization of Industrial Trade Unions, Local 119, previously certified as the collective-bargaining representative of the employees in the unit described in paragraph 5, merged with its parent organization, National Organization of Industrial Trade Unions (NOITU).

7. By the merger described in paragraph 6, NOITU became the successor to National Organization of Industrial Trade Unions Local 119, and the collective-bargaining representative of the employees described in paragraph 5.

8. In mid-December 1997, without notification to the collective-bargaining representative or giving it an opportunity to bargain, Respondent unilaterally gave wage increases to certain employees in order to persuade other employees that they could obtain raises without the Union, and to discourage them from engaging in union activities, thus violating Section 8(a)(1), (3), and (5) of the Act.

9. On January 21, 1998, without giving notice to the collective-bargaining representative an opportunity to bargain, Respondent unilaterally issued a memorandum to unit employees reducing their pay effective February 1, 1998, thus violating Section 8(a)(1) and (5) of the Act.

10. Respondent has not violated the Act except as stated herein.

REMEDY

It having been found that Respondent has committed certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and to take certain affirmative actions necessary to effectuate the policies of the Act.

It having been found that Respondent unlawfully discharged Peter Hanscom on June 10, 1997, Joseph Niciforo on June 20, 1997, Henry Brodhurst on February 20, 1998, and Eton Leung on May 1, 1998, I recommend that Respondent be ordered to offer each of them reinstatement to his former position, without prejudice to his seniority or other rights and privileges previously enjoyed, discharging if necessary any employee hired to fill said positions. I further recommend that each of these employees be made whole for any loss of earnings and benefits he may have suffered because of Respondent's unlawful conduct from the date of his discharge to the date of Respondent's offer to reinstatement, in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[54] I shall also recommend an expunction order.

It having been found that Respondent on January 21, 1998, unilaterally reduced the pay of the employees in the above-described unit effective February 1, 1998, without giving their collective-bargaining representative an opportunity to bargain over this action. I shall recommend that Respondent be ordered to bargain over this change, and to pay the unit employees backpay from the date of the reduction until the earliest of the following conditions is met: (1) mutual agreement is reached with the bargaining representative relating to the subjects about which Respondent is required to bargain; (2) good-faith bargaining results in a bona fide impasse; (3) the failure of the bargaining representative to commence negotiations within 5 days of the receipt of Respondent's notice of its desire to bargain; or (4) the subsequent failure of the bargaining representative to bargain in good faith. *San Antonio Portland Cement Co*., 277 NLRB 338 (1985).

Nothing herein shall be construed as requiring Respondent to rescind the unilateral raises already given to employees as described in Conclusions of Law 8 above, and the bargaining representative's refusal to consider any proposed raise to the other unit employees less than the unilateral raises shall not be evidence of bad-faith bargaining.

[Recommended Order omitted from publication.]

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[54] Under *New Horizons*, interest is computed at the "short term" Federal rate for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment), shall be computed as in *Florida Steel Corp*., 281 NLRB 651 (1977).